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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 253

RONALD MILLER, ET AL.,
Petitioners,

v.

ROBERT W. JENNINGS, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE STATE OF TEXAS, AMICUS CURIAE

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MOTION FOR LEAVE TO FILE

The State of Texas, by its Attorney General, asks leave of the Court to file its Brief, Amicus Curiae, in the above entitled and numbered cause.

WILL WILSON
Attorney General of Texas

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BRIEF FOR THE STATE OF TEXAS AMICUS CURIAE

ARGUMENT

The State of Texas is vitally interested in the issues raised by the Petition in this case because of the adverse effect the decision of the Court of Appeals will have on state control of the disposition and use of its water resources. In the last analysis, the extent to which a state controls the utilization of its water resources is completely dependent on the extent to which the courts are able to compel obedience to the provisions of its laws. Even though state law may confer certain rights on water users which under the law are to be respected by upstream

users, if on any stream the downstream users and the state are unable to insist on compliance with state law in court, the water policies of the state have become a dead letter on that stream.

The decision in *Hudspeth District v. Robbins*, 213 F. 2d 425 (CA5) had precisely this effect on streams on which there are Federal Reclamation Projects. In that case it was held that the courts are without jurisdiction over water rights of individual landowners claiming under state law but served by a Federal Reclamation Project because the United States is an indispensable party to such suits, and sovereign immunity had not been waived. Thus, despite the clear and unequivocal declarations in the Reclamation Act that the water rights of landowners within Reclamation Projects shall be subject to state laws "relating to the control, appropriation, use, or distribution of water used in irrigation,"[1] under *Robbins* the policies of the state did not govern streams on which Reclamation Projects are located, but at most furnished general guides for federal officials to use in finally determining the rights of water users served by the Project and those downstream.

It is not unusual, of course, for the sovereign immunity doctrine to produce harsh results, but the waiver of immunity in issue here was specifically designed to correct this anomaly whereby private landowners within a state claiming water rights under state law are permitted to plead the sovereign immunity of the United States to avoid meeting on the merits contentions that they violate state law.

[1] Act of June 17, 1902, c. 1093, § 8, 32 Stat. 390; 43 U.S.C. § 372.

[2] Act of July 10, 1952, 66 Stat. 560, 43 U.S.C.A. 666.

As interpreted by the Court of Appeals here, however, the consent statute grants no consent, and this holding gives Texas, the only state within the reach of the pronouncements of the Court of Appeals for the Fifth Circuit to which the Reclamation Act and the consent statute apply, great concern. It is imperative that the State and its citizens know whether approval by Texas of a federal project on a stream still constitutes a substitution of federal administrative discretion for judicial enforcement of its water laws in the affected area.

The waiver of sovereign immunity here in issue extends sovereign consent to the joinder of the United States as a party defendant in "any suit for the adjudication of rights to the use of water of a river system or other source," and any suit cast so as to require the adjudication of the relative rights of any two or more water users on a stream is a "suit for the adjudication of right to the use of water of a river system" and comes within the terms of the consent statute. This is true whether the suit takes the form of injunction, suit to quiet title, declaratory judgment, statutory adjudicatory proceeding or otherwise. There is no need to go behind the plain meaning of the statute to ascertain its effect.

The argument of the Solicitor General that the term "any suit for the adjudication of rights to the use of water of a river system" extends sovereign consent only to suits in which jurisdiction has been acquired over all persons having rights on a river system for the purpose of adjudicating the rights of all *inter sese* is wholly irreconcilable with the language it purports to apply.

The Government argues that when so interpreted the Statute excludes ordinary suits for the adjudication of the relative rights of a few water users on a stream and applies only to the special statutory proceedings provided in some western states for the adjudication of all rights on a stream within the state. It is apparent, however, that if Congress did in fact limit its consent to suits in which all claims on a "river system" are joined for a general adjudication of water rights, these statutory proceedings also fall short of the consent granted for the simple reason that no state can obtain jurisdiction of all rights on an entire *river system* of any significance. No stream in Colorado, Nevada, Nebraska or Wyoming, for example, comes within the terms of the statute as interpreted by the Government since each stream in these states is but a part of a larger interstate river system, and these states are obviously without jurisdiction over all rights on the vast river systems to which their streams contribute. In order to reach the conclusion advocated by the Solicitor General, it would be necessary for the Court to re-write the phrase "any suit for the adjudication of rights to the use of water of a river system" so as to read "any suit for the adjudication of *all* rights to the use of water of *that part of a river system which lies within a single state.*"

The obvious fallacy in the Government's argument that the statute requires the joinder of all rights on the stream lies in its assumption that Congress intended to prescribe party requirements completely at war with the joinder rules of the courts in which these cases are to be tried. No court has ever held

that there must be a general adjudication of all rights to a particular source of supply before any rights to the use of the water may be determined. The only authority cited by the Court of Appeals which considered any such contention specifically rejected it. *Wilson v. Reeves County W. I. Dist. No. 1*, Tex. Civ. App. 256 S. W. 346, and the cases cited by the Government clearly recognize that adjudications of water rights are often had in suits with only a few water users before the court. See e. g. *Washington State Sugar Co. v. Sheppard*, 186 Fed. 233 (D. Idaho); *Spanish Fork West Field Irrigation Co. v. District Court of Salt Lake City*, 99 Utah 527, 104 P. 2d 253. The rules governing joinder of parties in suits for the adjudication of water rights are succinctly stated in Wiel, *Water Rights in the Western States*, 3d Ed., Vol. 1, pp. 687-688, as follows:

> "In order to settle the rights of all claimants upon a stream against each other, all must, hence, be brought into court in the same suit. That all the owners of outstanding rights in the stream be brought into court so that the rights of each against all may be determined by the decree, is now frequently provided by statute, as already mentioned. And in the absence of a statute so commanding it is within the inherent power of the court to order the joinder in any suit of all the other claimants. . . . And finally, without statute or court order, it is allowed to the parties to voluntarily join all the claimants they see fit, in any such action to determine rights. . . .
>
> "But in the absence of statute, such court order for joinder of outstanding rights is dis-

> cretionary only, and such voluntary joinder of them is permissive only. In the absence of statute, it is not *essential* to have them all brought in. If they remain out and the court does not think it advisable to order them in, the decree can settle nothing against them, and can only determine the relative rights of those in court; but that it can do, and as to that the others are not necessary parties. They are necessary to the rendition of a decree good "against the world," but not necessary to a decree only as against the specific party who is in court. The court may determine that he is a wrongdoer against the plaintiff without determining what plaintiff's rights are against the rest of the world. . . ."

The Solicitor General states that "the statutes of all the western states have provided in one form or another for suits to adjudicate all rights to a particular water source". (Government's Brief, p. 6), and implies that in the western states (i. e. those having the doctrine of prior appropriation) no water rights may be judicially determined except in these general adjudications. The inaccuracy of these contentions is readily apparent. Texas and Kansas have no such special statutory procedures at all, and in most of the other western states the statutory proceeding is an alternative or supplementary remedy to ordinary suits for the adjudication of relative water rights. Only in Nevada, New Mexico, North Dakota, Oklahoma, South Dakota and Utah is there any requirement that all claimants be joined in any suit for the adjudication of rights in a particular water source. Hutchins, *Selected Problems in the Law of Water Rights in the West*, pp. 80-109, 431-469.

While it may be feasible in sparsely populated and extremely arid states to require the joinder of all claimants on a stream system whenever any dispute over rights arises, it is a physical impossibility to do so in Texas. In Texas, and in most other western states, it is recognized that a dispute between two water users as to their rights may be settled between them without dragging in all parties on the stream whose rights are not in dispute. Only those whose presence is necessary to a final resolution of the controversy before the court are required to be joined unless the court determines that an adjudication of that controversy would only precipitate further disputes or that the convenience of the stream would otherwise be served by the joinder of additional rights. Statutory adjudicatory procedures are, of course, included within the phrase "any suit for adjudication of rights to the use of water of a river system," but many other types of suits fall in the same category. There is no evidence that Congress preferred the one to the others in extending its consent to be joined as a defendant to water rights adjudications.

The proper construction of the waiver of immunity here in issue is apparent. If a suit is cast so as to require the adjudication of water rights, and the United States is a necessary party and claims appropriative rights, consent to the adjudication of the rights of the United States has been given. Congress intended by this consent statute to mitigate the hardships resulting from sovereign immunity, and the relief granted by Congress should not have been

artificially circumscribed by the Court of Appeals so as to render its purpose ineffectual.

Perhaps the Court of Appeals did not intend to hold that the consent statute required the joinder of all claims on a river system as a condition of sovereign consent, but did intend to hold that, under the ordinary rules governing party determinations, the various upstream water users served by the Rio Grande Project are necessary or indispensable parties to an adjudication of the water rights under which the United States diverts water for their benefit. If so, the question presented does not involve an interpretation of the consent statute since a jurisdictional defect in parties would require a dismissal of the complaint in any case.

Thus is raised the question of whether the class action device is available for the joinder of a class of necessary or indispensable parties to a water suit. The State of Texas has a very real interest in this question also because Texas courts, having adopted Rule 23 as their own,[3] are inclined to follow federal decisions as to the construction of borrowed federal rules. *Ex Parte Odom*, 157 Tex. 577, 271 S. W. 2d 796. If the Court of Appeals correctly states the law relating to class actions, the import of its decision greatly exceeds its effect on suits in which the United States is an indispensable party. If all water users served by an irrigation project must be personally joined before the rights under which the project diverts water may be adjudicated, no water rights suit of any significance is subject to judicial determination in the federal courts or in Texas. For example, a

[3] Rule 42, Texas Rules of Civil Procedure

suit which far exceeds this one in scope and complexity is now pending in the Texas courts for the adjudication of water rights in the lower Rio Grande, see *Hidalgo County W. I. D. No. 2 v. Blalock*, ___ Tex. ___, 301 S. W. 2d 593, and the successful completion of that suit is absolutely dependent on a view of class actions directly opposed to that of the Court of Appeals here.

It will be assumed that the upstream water users served by the Rio Grande Project are necessary or indispensable parties. Similarly situated water users were held to be necessary parties under Texas practice in *Watkins Land Co. v. Clements*, 98 Tex. 578, 86 S.W. 733, and *Wilson v. Reeves County W. I. District No. 1*, Tex. Civ. App., 256 S.W. 346, cited in the opinion of the Court of Appeals, and the same result may follow in the federal courts from *Commonwealth Trust Co. of Pittsburg v. Smith*, 266 U.S. 152. The allegations of the complaint are clearly sufficient as against a motion to dismiss on the issues of the existence of a class, absence of antagonistic interests and proper representation. Therefore, the only question for decision is whether a judgment in an action against representatives of a class of necessary or indispensable parties binds all members of the class.

In holding that a judgment here would not bind the class, the Court of Appeals relied on its previous decision in *Martinez v. Maverick County W. C. & I. D. No. 1*, 219 F.2d 666 (CA5), but the cases are not in any way apposite. In the *Martinez* case a declaratory judgment was sought in a diversity action to resolve unsettled questions of substantive Texas

law relating to the relative rights of riparian proprietors and those claiming appropriative rights. Neither the plaintiff nor the defendant classes were necessary or indispensable parties to this declaratory proceeding. The Court affirmed the dismissal of the complaint, one judge dissenting, as within the trial court's discretion. The Court reasoned (a) that the judgment would not bind absent members of the classes, since the attempts at virtual representation were only "spurious" class actions under Rule 23(a)(3), and (b) that the decision would not be effective as *stare decisis* since the suit required the application of substantive law.

This is certainly not the case here. In the first place, it is not within the discretion of a federal court to dismiss a case because of unsettled questions of substantive state law when the case has been removed from the very court which could have settled the issues. In the second place, this is not a "spurious" class action under Rule 23(a)(3) but a "true" class action under Rule 23(a)(1), and a judgment in a true class action, as the Court in *Martinez* specifically recognized, will bind all members of the class:

> "As has been often stated, Rule 23(a), Federal Rules of Civil Procedure divides class actions into three types according to the jural type, 23(a)(1), covers cases where the right sought to be enforced is joint, common, or derivative, and is termed the *true class suit*. 3 Moore's Federal Practice, 2nd Ed., Sec. 23.08, pp. 3434 et seq. Professor Moore states that 'The doctrine of res judicata as applied to true class actions has been clearly settled by the

> United States Supreme Court in Supreme Tribe of Ben Hur v. Cauble, (255 U.S. 356 [41 S.Ct. 338, 65 L.Ed. 673])', 3 Id., Sec. 23.11, p. 3460. The second type, 23(a)(2), covers cases calling for the distribution or management of specific property, and is termed the *hybrid class suit*. 3 Id., Sec. 23.09, pp. 3439 et seq. As to hybrid class actions, Professor Moore succinctly states the rule as follows: 'Insofar as the proceedings operate in rem they are conclusive; insofar as they are in personam they do not bind those not parties.' 3 Id., Sec. 23.11(4), pp. 3468, 3469. The third type, 23(a)(3), covers cases where the class is formed solely by the presence of a common question of law or fact, is in reality a permissive joinder device, and is termed the *spurious* class suit. 3 Id., Sec. 23.10, pp. 3442 et seq. In a spurious class action the decree does not bind the class, but binds only those actually before the court. 3 Id., Sec. 23.11(3), pp. 3465 et seq., and authorities there cited." (219 F.2d at 671-672).

Though the Court of Appeals correctly stated the controlling principles in the *Martinez* case, these principles have been misapplied here. In *Martinez* the members of the class were not necessary or indispensable parties, while here all members of the defendant class are, as is shown above, necessary or indispensable to the suit, and this difference, it is submitted, is decisive. Though Rule 23(a)(1) refers to "joint" and "common" rights in describing suits within its provisions, the key to the question of whether a particular suit falls within the true class action category is not found in any theoretical an-

alysis of the rights of the class under substantive law, but is found in their jural relations—the eminently practical inquiry into their status as parties to the particular lawsuit under consideration. *Pentland v. Dravo Corp.*, 152 F.2d 851 (CA3). Professor Moore states the test in his treatise as follows:

> "Various tests have been proposed to determine whether a suit is a true class action. The doctrine of *Temperton v. Russell* that beneficial proprietary rights are the determinative factor of the propriety of class suits has fallen into disrepute. So has the doctrine that the presence of a fund is the determinate. These efforts at nomenclature are, however, significant. They illustrate the desire of courts to find a unity of interests between the parties. This can be expressed better in terms of joinder. *The 'true class suit' is one wherein, but for the class action device, the joinder of all interested persons would be essential.* This would be in cases where the right sought to be enforced was joint, common or derivative." 3 Moore's *Federal Practice*, 2d Ed., Sec. 23.08, pp. 3434-3435. (Emphasis supplied).

The joinder of all interested parties is "essential" when they are necessary or indispensable parties. It follows that if all members of a class are necessary or indispensable to the suit, *ipso facto* they form a true class, and all members of the class will be bound by judgment entered in a suit brought by or against their representatives.

The basic error of the Court of Appeals lies in its failure to recognize that a court's holding that all

members of a class are necessary or indispensable parties is by definition also a holding that the rights and duties of the members of the class are "joint" or "common" within the meaning of Rule 23(a)(1). The question of whether the rights and duties of the members of the class are "joint" as opposed to "common" is largely academic, since there is no difference in legal consequences between the two categories. But under Professor Moore's analysis of the distinction between joint and common rights, insofar as the plaintiff class here seeks to establish in itself a superior water right independent of those claimed by the defendant class, the rights asserted by each class are "joint". *Benz v. Compania Naviera Hidalgo S. A.*, 233 F.2d 62 (CA9), aff'd 353 U.S. 138; *Montgomery Ward & Co., Inc. v. Langer*, 168 F. 2d. 182 (CA8). Insofar as the plaintiff class seeks to establish in itself a beneficial interest in the same appropriative rights as those under which the defendant class claims, the rights asserted by each class are "common". *Supreme Tribe of Ben Hur v. Cauble*, 255 U. S. 356; *Smith v. Swormstedt*, 57 U. S. 288. The significant factor from the standpoint of deciding cases, however, is that in both aspects of this suit all members of the class are necessary or indispensable parties, and this being true, the suit is a true class action, and all members of the class will be bound by a judgment entered in the suit. 3 Moore's *Federal Practice*, 2d Ed., Sec. 23.11, pp. 3456 *et seq.*

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[1] 3 Moore's *Federal Practice*, 2d Ed., Sec. 23.08, pp. 3434 *et seq.*

CONCLUSION

The decision of the Court of Appeals is in error both in its construction of the consent statute and in its construction of the class action rule, and since a correct determination of both issues is of vital importance to effective control of the distribution and use of water resources in Texas and elsewhere, the Writ of Certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE

I, James W. Wilson, Assistant Attorney General, certify that I have mailed copies of the foregoing Motion and Brief to the Attorney General and the Solicitor General of the United States, respectively, at the Department of Justice Building, Washington, D. C., and to Eugene T. Edwards at 11th Floor Bassett Tower in El Paso, Texas, Louis A. Scott at 1100 First National Building in El Paso, Texas, Theodore Andress at El Paso National Bank Building in El Paso, Texas, and J. A. Rauhut and W. Morgan Hunter at the Brown Building in Austin, Texas.

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